MALAYSIAN REPORTS

RE THREE PETITIONS FOR LETTERS OF ADMINISTRATION

[O.C.J. (Lee Hun Hoe J.) June 28, 1971]

[Kota Kinabalu — Petitions for Letters of Administration Nos. 5 of 1971, 8 of 1971, and 13 of 1971]

Probate and Administration — Public Trustee— Court's discretion to grant probate or letters of administration — Public Trustee Ordinance, 1950.

Small Estates — Administration of — Grant of letters of administration — Whether Administrator-General has a right to apply — Administration of Native and Small Estates Ordinance (Sabah, Cap. 1), ss. 3 & 4 and Probate and Administration Ordinance (Sabah, Cap. 109), ss. 24, 28 & 30.

Three petitions for letters of administration were filed in the High Court under the Probate and Administration Ordinance (Chapter 109). In each of the petitions No. 5 of 1971 and No. 13 of 1971, the Administrator-General was the petitioner. In petition No. 8 of 1971 the Public Trustee was the petitioner. It was not in dispute that the declared value of the deceased's estate in each case was less than $5,000. When the petitions came before the learned deputy registrar, he considered that since these petitions concerned small estates they should be dealt with by the collector under the Administration of Native and Small Estates Ordinance (Cap. 1) where the preamble purports "to make special provision for the administration of deceased native and small estates". He therefore ruled that the petitioners should apply through the collector rather than through the High Court for letters of administration and accordingly dismissed the petitions.

The petitioners appealed. The three appeals were dealt with together.

A procedural point was taken that the learned deputy registrar was wrong in dismissing the petitions without going into the merits or considering whether there was any default in complying with the rules of procedure and practice.

Held: by virtue of section 28 of the Probate and Administration Ordinance, the Administrator-General has the right to apply to the High Court for grant of letters of administration irrespective of the amount of the estate. Therefore the learned deputy registrar was wrong in dismissing the applications of the Administrator-General whose position is unlike that of the Public Trustee so far as the administration of estates is concerned. Therefore, the learned deputy registrar's order was to be set aside and the Administrator-General be granted letters of administration in respect of his two petitions. In the case of petition No. 8 of 1971 liberty would be given to the Public Trustee to submit a fresh petition.

Per Lee Hun Hoe J.: "Under section 8(1) of the Public Trustee Ordinance, 1950, the court has a discretion whether to grant the Public Trustee probate or letters of administration. Under section 8(2) his position is no better than any person or class of persons entitled to obtain the grant of letters of administration. As between him and the widower, widow or next of kin of the deceased, the latter are preferable unless for good cause shown to the contrary."

PETITION.

T. Rajan for the petitioners.

Charles Ho (State Assistant Attorney-General), *amicus curiae.*

Cur. Adv. Vult.

Lee Hun Hoe J.: Three petitions for letters of administration were filed in the High Court under the Probate and Administration Ordinance (Cap. 109). In each of the petitions No. 5 of 1971 and No. 13 of 1971, the Administrator-General was the petitioner. In petition No. 8 of 1971 the Public Trustee was the petitioner. It was not in dispute that the declared value of the deceased's estate in each case was less than $5,000. When the petitions came before the learned deputy registrar he considered that since these petitions concerned small estates they should be dealt with by the collector under the Administration of Native and Small Estates Ordinance (Cap. 1) where the preamble purported "to make special provision for the administration of deceased native and small estates". He therefore ruled that the petitioners should apply to the collector rather than to the High Court for letters of administration and dismissed the petitions. The petitioners appealed. For convenience the three appeals are dealt with together.

Mr. T. Rajan appeared for the petitioners and Mr. Charles Ho, the State Assistant Attorney-General appeared as *amicus curiae.*

A procedural point was taken that the learned deputy registrar was wrong to dismiss the petitions without going into the merits or considering whether there was any default in complying with the rules of procedure and practice. I need only point out that where an action has not been set down for trial the effect is not clear. But it would seem that when he dismissed the petitions he was actually refusing the applications. There are a great many cases in which the Rules of the Supreme Court do not make any provision for the dismissal of an action, but in which the court deals with them by dismissal under the general or inherent jurisdiction of the courts. See *White Book* 1963 at page 2006. To decide whether the learned deputy registrar was right or not one would have to look at the relevant legislation.

The Administration of Native and Small Estates Ordinance (Cap. 1) came into force on January 25, 1941. The objects and reasons for the promulgation of this Ordinance were stated in the Bill published in the North Borneo Official *Gazette* No. 406 dated November 1, 1940 at page 260 as follows:—

"Part VI of the Land Ordinance, 1930, provided for the succession to Native Lands and lands of small value but did not provide for the distribution of the personal property of the deceased. This Bill is based on Part VI of the Land Ordinance and Chapter XIX of the Probate and Administration Enactment (Cap. 8) of the Federated Malay States and is intended to afford a simple and inexpensive method of administering and distributing native estates and estates of small value, whether composed of land or personal property or both."

This Ordinance resulted in the repeal of some sections of the Land Ordinance, 1930. These repealed sections consisted of provisions dealing with succession to native land and small estates. Chapter XIX of the Probate and Administration Enactment (Cap. 8) of the Federated Malay States dealt with the distribution and administration of small estates. Only some of the provisions in that chapter were adopted by the legislature with modifications to suit local conditions.

The Administration of Native and Small Estates Ordinance (Cap. 1) was subsequently amended by section 10(a)(ii) of the Intestate Succession Ordinance

(No. 1 of 1960) increasing the value of the small estate from $3,000 to $5,000. The earlier edition of the Administration of Native and Small Estates Ordinance (No. 1 of 1941) did not contain the preamble "To make special provision for the administration of deceased native and small estates". This preamble was inserted into the revised 1953 edition, that is, the Administration of Native and Small Estates Ordinance (Cap. 1) by the Commissioners in the exercise of their powers under section 4 of the Revised Edition of the Laws Ordinance (See Laws of North Borneo 1953, Vol. 1, page xxviii).

Sections 3 and 4 of the Administration of Native and Small Estates Ordinance (Cap. 1) read:—

"3. When the owner of any estate has died the executor named in the will of the deceased or, if there is no such executor, any person claiming, under the said will or according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, to be entitled to the whole or any part of the deceased's estate, or any creditor of the deceased, or any police officer, or, where the deceased was a native, the headman of the village in which the deceased resided or owned any property may make an application to the Collector for an order for the distribution of the estate or that he may be appointed administrator of the estate.

4. If an application under section 3 is made prior to the institution of proceedings under the Probate and Administration Ordinance the Collector of the district where the greater part in value of an estate is situated shall, subject to the provisions of this Ordinance, have exclusive jurisdiction to deal with the whole estate wherever situated in the Colony: Provided that the Commissioner of Lands may order any application under this Ordinance to be heard by the Collector of any other district whenever it is made to appear that such an order is expedient for the ends of justice."

Sections 3 and 4 were based on sections 179 and 180 of the Probate and Administration Enactment (Cap. 8) of the Federated Malay States. Mr. Rajan contends that the power vested in the collector is not exclusive and that a petitioner is not precluded from going to the High Court in which exclusive power is vested in its original jurisdiction by virtue of section 24(f) of the Courts of Judicature Act, 1964. Under section 3 in cases of intestates those persons who may apply for letters of administration are the beneficiary, creditor, police officer or headman. It does not include the Administrator-General, the Public Trustee or any statutory officer who makes legal representation to the intestate estate.

It seems clear that the collector would only have jurisdiction if there is no prior institution of proceedings under the Probate and Administration Ordinance (Cap. 109). The purpose of these sections is to save costs and provide convenient alternative venues for the *raayat* in districts where there are no High Court registries. In other words in such districts where petitioners apply to the collector for letters of administration, provided that they have not prior to their applications instituted proceedings under the Probate and Administration Ordinance, then the collector would have jurisdiction. Under section 3 those who are entitled to apply to the collector for grant of letters of administration would appear to have a discretion as indicated by the words "may make an application to the Collector." That this is so is made even clearer by section 4.

Section 178 of the Probate and Administration Enactment (Cap. 8) of the Federated Malay States reads:—

"178. All applications for grants of letters of administration to small estates shall be made and dealt with in accordance with the provisions contained in this Chapter and not otherwise..."

The above provision was not incorporated into the Administration of Native and Small Estates Ordinance (Cap. 1) by the legislature. There is substance in the contention that the implication is that the legislature did not intend to give exclusive power to the collector to entertain all petitions in respect of small estates. His jurisdiction is co-ordinate rather than exclusive.

It is interesting to note that the provision of section 169 of the Probate and Administration Ordinance (No. 9 of 1947) was in substance similar to section 178 of the Probate and Administration Enactment (Cap. 8) of the Federated Malay States. However, section 169 was later repealed and omitted in the Probate and Administration Ordinance (Cap. 109) which came into force on June 16, 1947. By the Modification of Laws (Declaration of Federal Present Laws)(Sabah) Order, 1965, a considerable number of present laws of Sabah, including the Probate and Administration Ordinance (Cap. 109) were declared Federal laws and deemed to come into force on Malaysia Day.

Sections 28 and 30 of the Probate and Administration Ordinance (Cap. 109) read:—

"28.(1) In any case where a person dies intestate or without appointing executors or where no executor takes out probate of the will, the Administrator-General may apply for letters of administration of the estate and effects of such intestate or of such testator.

(2) Where an order has been made for the grant of letters of administration to any person and such person has not within three months from the date of such order furnished the administration bond required under section 79 the Administrator-General may apply to the court to set aside the said order and to grant letters of administration of the estate and effects to himself.

(3) On application being made by the Administrator-General under subsections (1) and (2) letters of administration shall be granted to the Administrator-General accordingly, unless in any particular case the court for sufficient reasons directs that letters of administration be granted to a person other than the Administrator-General.

30. From and after the decease of persons dying intestate and until letters of administration shall be granted in respect of their estates and effects, the estates and effects which were of such deceased persons shall be vested in the Administrator-General."

By virtue of section 28 the Administrator-General has the right to apply to the High Court for grant of letters of administration, irrespective of the amount of the estate. Therefore if the petitioner has the right to elect whether to go to the High Court or collector in respect of small estates *a fortiori* the Administrator-General must have a better right to do so. The whole of Chapter XIX of the Probate and Administration Enactment (Cap. 8) of the Federated Malay States was repealed by section 32 of the Small Estates (Distribution) Ordinance, 1955 which has not been extended to East Malaysia. There are provisions in this Ordinance to enable the High Court to transfer

estates of small value to the collector and for the collector to transfer estates which he considers beyond his jurisdiction to the High Court. Then there is section 4(2) which reads:—

"The Collector of the District where the greater part in value of the property is situated shall have exclusive jurisdiction to deal with the distribution and administration of the whole estate, wherein situated in the States of Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu."

All these provisions have not been incorporated in the Probate and Administration Ordinance (Cap. 1).

Mr. Ho agrees with Mr. Rajan substantially and submits that since section 3 of the Administration of Native and Small Estates Ordinance (Cap. 1) does not apply to the Administrator-General he cannot therefore apply to the collector. He can only apply to the High Court. There is therefore no question of discretion. This is supported by the provisions of sections 24 and 28 of the Probate and Administration Ordinance (Cap. 109). The Administrator-General could only apply under section 28. Other beneficiaries must rely on section 24 in respect of an intestacy. Assuming that section 3 of the Administration of Native and Small Estates Ordinance (Cap. 1) includes the Administrator-General then it is still open to him like other petitioners to apply to the High Court in the light of section 4. There is no provision to say that all small estates must go to the collector. So that it does not exclude small estates going to the High Court.

Section 28 of the Probate and Administration Ordinance (Cap. 109) does not apply to the Public Trustee who must rely on the provisions of the Public Trustee Ordinance, 1950. The position of the Public Trustee is different from that of the Administrator-General. The Public Trustee Ordinance, 1950 together with the subsidiary legislation made thereunder were extended to both Sabah and Sarawak by the Modification of Laws (Public Trustee) (Extension to Borneo States) Order, 1966 (P.U. 99 of 1966) made under section 74 of the Malaysia Act (F.M. 26 of 1963).

Subsections (1), (2) and (3) of section 8 read:

"8(1) If, in pursuance of any rule under this Ordinance, the Public Trustee is authorised to accept by that name probates of wills or letters of administration the court may grant such probate or letters of administration to the Public Trustee by that name.

(2) For such purpose the court shall consider the Public Trustee as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the Public Trustee shall not be required for the grant of letters of administration to any other person and that, as between the Public Trustee and the widower, widow, or next-of-kin of the deceased, the widower, widow, or next-of-kin shall be preferred, unless for good cause shown to the contrary.

(3) Any executor who has obtained probate or any administrator who has obtained letters of administration, and notwithstanding that he has acted in the administration of the deceased's estate, may, with the sanction of the court and after such notice to the persons beneficially interested as the court may direct, transfer such estate to the Public Trustee for administration either solely or jointly with the continuing executors or administrator, if any."

Section 6 deals with the administration of estates of small value and vesting of trust property.

Section 6(i) reads:—

"6(i) Any person who in the opinion of the Public Trustee would be entitled to apply to the court for order for the administration by the court of an estate, the gross capital value whereof is proved to the satisfaction of the Public Trustee to be less than five thousand dollars, may apply to the Public Trustee to administer the estate, and where any such application is made and it appears to the Public Trustee that the persons beneficially entitled are persons of small means, the Public Trustee shall administer the estate, unless he sees good reason for refusing to do so."

The Public Trustee is discouraged from invoking this section because of a ruling by Taylor J. in Originating Summons No. 116/50 (unreported). There the Public Trustee purported to administer an estate under $5,000 in value under the section without any grant of representation. The matter arose because he made an application for the appointment of a guardian of the property of an infant beneficiary. This practice of the Public Trustee giving letters of administration to himself existed since 1935. Taylor J. considered that the expression "administration by the court" referred to any administration action which would arise only after a grant of representation had been issued. He therefore held that the Public Trustee had no power to administer without a grant and that since he was an administrator *de son tort* he had no *locus standi* to apply to the court. Accordingly he dismissed the summons with costs.

Under section 8(1) the court has a discretion whether to grant the Public Trustee probate or letters of administration. Under section 8(2) his position is no better than any person or class of persons entitled to obtain the grant of administration. As between him and the widower, widow or next-of-kin of the deceased, the latter are preferred unless for good cause shown to the contrary.

Now in petition No. 8 of 1971 the deceased died leaving a widow, a son and a daughter. The fact that the Public Trustee acted as trustee for the deceased does not automatically give him the right to the letters of administration though it is a good ground to support his application. More is required. For instance, he could easily obtain the consent of the beneficiaries to enable him to administer the estates in their interest. He may have other reasons to apply for administration. All the reasons must be given in the petition.

For reasons given I consider the learned deputy registrar was wrong to dismiss the applications of the Administrator-General whose position is unlike that of the Public Trustee so far as the administration of estates is concerned. I would therefore set aside his orders and grant the Administrator-General letters of administration in respect of his two petitions. In the case of petition No. 8 of 1971 I would give liberty to the Public Trustee to submit a fresh petition bearing in mind what I said about section 8(2) of the Public Trustee Ordinance, 1950.

Order accordingly.